No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-1309

UNITED STATES OF AMERICA, PETITIONER

v.

ALFREDO L. CACERES

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

CITATIONS

Pages

Pages

STATUTES

RULES AND REGULATIONS

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QUESTION PRESENTED

Whether the Ninth Circuit was correct in holding that evidence unlawfully seized by Internal Revenue Service agents engaging in conduct substantially violative of their agency's published regulations should be suppressed.

STATUTORY AND OTHER PROVISIONS INVOLVED

In addition to the Internal Revenue Manual provisions set forth in the Government's Petition (hereinafter "G.P.") at pp. 3-4, Paragraphs 9381(3), 9389.1, 9389.7, and 652.1 are also involved in this case. These provisions are set forth in full in Appendix A to Respondent's Opposition.

STATEMENT

Respondent Dr. Alfredo L. Cacerces is charged with violating 18 U.S.C. § 201(b). In August 1975 Dr. Caceres was tried before a jury in the United States District Court for the Northern District of California. He raised defenses of entrapment and diminished mental capacity, offering expert psychiatric testimony on the latter issue. The jury was unable to agree on a verdict, and the Court declared a mistrial. Before his second trial, Dr. Caceres retained new counsel and brought a motion to suppress evidence unlawfully seized by agents of the Internal Revenue Service (hereinafter "IRS"). The District Court found that substantial portions of the evidence in question—recordings of face-to-face conversations during which IRS agents conducted electronic surveillance against Dr. Caceres—were seized in violation of Internal Revenue Service Regulations and must be suppressed.

The electronic surveillance on which respondent's motion was based began in March 1974, during an audit of respondent's individual and employment tax returns. Revenue Agent Robert K. Yee claimed that during March 1974, Dr. Caceres offered him a personal settlement in order to receive a favorable resolution of the audit on the above-mentioned returns. Suppression Hearing Transcript (hereinafter "S. Tr.") 23. On March 21, 1974, IRS personnel electronically monitored and recorded a conversation between Agent Yee and Dr. Caceres without the latter's knowledge. No further investigation of Agent Yee's allegations of bribery occurred for the next ten months. S. Tr. 23-24.

On January 30, 1975, Agent Yee telephoned Dr. Caceres and proposed a meeting for the following day. *See* S. Tr. 15. On February 5, 1975, Agent Yee again called Dr. Caceres

and proposed a meeting for the following day. *See* S. Tr. 17-18. During the two meetings thus arranged by Agent Yee for January 31 and February 6, 1975, IRS personnel conducted the electronic eavesdropping against Dr. Caceres that is the subject of the Government's petition.

Although the Internal Revenue Manual requires prior written authorization for electronic eavesdropping from the Attorney General of the United States or any designated Assistant Attorney General, Internal Revenue Manual ¶ 652.22(1), and the agent in charge, Inspector Hill, was familiar with the procedures, S. Tr. 39-40, it is conceded that the agents did not follow this procedure. Instead, an oral request was made to the Director of the Internal Security Division of the IRS. Despite the ten-month interval between Agent Yee's initial allegation and the electronic eavesdropping at issue here the apparent justification for this procedure was that an emergency existed, and that in such cases the Director of the Internal Security Division is empowered to grant authorization orally. Internal Revenue Manual ¶ 652.22(6).

On the basis of this conversation with the Director, Hill and the others conducted electronic eavesdropping against Dr. Caceres during his conversation with Agent Yee on January 31, 1975. No written request for authorization was drafted until that date. *See* Defendant's Exhibit (hereinafter "D. Exh.") L; S. Tr. 49. On February 7, 1975, one week after the request was telecopied to Washington, the IRS submitted it to the Justice Department for review and approval.[1] D. Exh. P. In the meantime, the agents again conducted electronic eavesdropping against Dr. Caceres on

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1. The Government is incorrect in stating (G.P. 7) that at the time of the electronic eavesdropping on February 6, 1975 a request for authorization was pending. The IRS did not transmit the authorization request to the Justice Department until February 7, 1975. *See* D. Exh. P.

February 6, once again on the authority of a telephone conversation with one of their superiors within the IRS.

After hearing the agents' testimony, the District Court found that there were no exigent circumstances in this investigation, and that "the only 'emergency' was created wholly by the I.R.S." Suppression Order, p. 6.[2] Therefore, the Court concluded, the Government had not justified its failure to follow the standard authorization procedures set forth in the IRS regulations in conducting elecronic eavesdropping during the January 31, 1975 and February 6, 1975 conversations. The Ninth Circuit agreed and affirmed as to these conversations,[3] stating:

> these "exigencies" were entirely government-created. [citations omitted] There is no reason to believe that the requests could not have been made earlier. The investigation had been going on for some ten months, and the appellee was readily available for questioning during that time.

REASONS FOR DENYING THE PETITION

As to the question presented in this case, there is no conflict between the ruling of the Court of Appeals for the Ninth Circuit and the decisions of this Court or of other courts of appeals. Nor is there any conflict with applicable state or territorial law. The decision below did not strike down or invalidate any Act of Congress, state law, or admin-

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2. The Government's statement (G.P. 7) of the reasons for the District Court's finding that there was no emergency is incomplete. The District Court also relied on the fact that the agents involved could offer no explanation for the ten-month hiatus between the agent's original allegation of bribery and the electronic eavesdropping at issue here.

3. The District Court also suppressed recordings made at a later face-to-face meeting and denied respondent's motion to suppress as to several electronically monitored telephone conversations. The Court of Appeals reversed as to the later face-to-face conversation. None of these rulings are at issue on the Government's petition.

istrative regulation. *See* R. Stern & E. Gressman, Supreme Court Practice § 4.12 at 168-69 (4th ed. 1969). The sole basis on which the Government seeks review is its claim that the law on the question presented is unsettled. A review of the pertinent authorities shows that in this case the Ninth Circuit adhered to doctrines consistently applied by this Court and the lower federal courts for several decades. The Government's petition fails to present an important issue not disposed of by these prior decisions and thus offers no basis for an exercise of the Court's certiorari jurisdiction. *See* R. Stern & E. Gressman, *supra*, § 4.11 at 167-68. The petition instead rests largely on the Government's disagreement with what it regards as an erroneous application of well-settled principles in this particular case. If the District Court and the Court of Appeals had so erred in this case, that would not be an appropriate basis for granting the writ. *See* R. Stern & E. Gressman, *supra*, § 4.18 at 178-79. Insofar as the Government's petition seeks an abandonment of established doctrines relating to the suppression of unlawfully seized evidence or the scope of the Due Process Clause, respondent submits that, as demonstrated in his opposition argument, this case is an inappropriate one for such a reconsideration.

1. The Government takes the position that its agents are not required to obey published regulations promulgated by their agency specifically to govern their conduct and to provide protection for citizens under investigation. G.P. 12, 14. The Government's petition is not a request for consideration of a novel question of law, but rather an invitation to the Court to retreat from "a settled rule that has been enforced in a wide variety of contexts." *Checkman v. Laird*, 469 F.2d 773, 780 (2d Cir. 1972): that administrative regulations, no less than statutes or the Constitution itself, have the force and effect of law. *United States v. Nixon*, 418 U.S. 683, 695,

41 L.Ed. 2d 1039 (1974). Agents of the Government must obey the regulations and procedures of a Government agency as long as they remain in effect, even though the agency had no obligation to formulate them and even though they are more generous to the citizen than the requirements of the Constitution or applicable statutes. When the unlawful actions of the Government's agents substantially violate a regulation designed to protect the interests of private citizens, due process of law is denied.

This principle has been applied to overturn the actions of agents of the Government in matters as to which the Government has always been accorded the broadest possible discretion by the courts. The leading case, *Accardi v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681 (1954) involved a violation of immigration regulations by the Attorney General of the United States. The Court overturned the action of the Attorney General, even though it has always been recognized that the federal government has plenary power over immigration. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 96 L.Ed. 586 (1952); *Jay v. Boyd*, 224 F.2d 957, 968 (9th Cir. 1955). Violation of agency procedures has been the basis for reversing discharge of government employees on grounds of national security. *Vitarelli v. Seaton*, 359 U.S. 535, 3 L.Ed. 2d 1012 (1959); *Service v. Dulles*, 354 U.S. 363, 1 L.Ed. 2d 1403 (1957). Officials of the legislative branch have been held bound by their own rules. *Yellin v. United States*, 374 U.S. 109, 10 L.Ed. 2d 778 (1963) (overturning conviction of contempt of Congress on the ground that refusal to testify was justified by Congresional Committee's failure to adhere to its own rules on executive sessions). *See generally, United States v. Nixon*, 418 U.S. 683, 694-96, 41 L.Ed. 2d 1039, 1056-57 (1974). Even military regulations "once issued must be followed scrupulously." *Brooks v. Clifford*, 409 F.2d 700, 706 (4th Cir. 1969); *see Sanger v. Seamans*, 507 F.2d 814, 817 (9th Cir. 1974). The

Government has advanced no reason why IRS agents should be immune from the due process restraints imposed on commissioners, cabinet members, and congressmen.

The principle that Government agents must obey their agency's regulations has been applied with particular rigor in accusatorial settings. In *Bridges v. Wixon*, 326 U.S. 135, 150-53, 90 L.Ed. 2103, 2113-15 (1945), the Court considered regulations of the Immigration and Naturalization Service providing detailed procedures for taking statements from witnesses in connection with deportation investigations. Evidence acquired in violation of these procedures was introduced at the deportation hearing. The Supreme Court held that the evidence should have been excluded, stating that "one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law." 326 U.S. at 153, 90 L.Ed. at 2114-15. *See Mah Shee v. White*, 242 F. 868, 871-72 (9th Cir. 1917) (Order refusing entry to alien overturned on the basis of alien's right, implied in Department of Labor regulations, to consult counsel); *Sibray v. United States*, 282 F. 795, 796-98 (3rd Cir. 1922) (Deportation custody held unlawful because of violation of alien's right to inspect warrant of arrest, under regulations of Commisioner General of Immigration.); *Jouras v. Allen*, 222 F. 756, 758 (8th Cir. 1915) (*id.*); *United States v. Dunton*, 288 F. 959, 960 (S.D.N.Y. 1924) (Deportation order overturned where immigration officials failed to observe rule entitling alien to have one friend or relative present at hearing.). *See generally, Bray v. United States*, 515 F.2d 1383, 1393, 1395 (Ct. Cl. 1975) (Involuntary discharge of serviceman voided where witnesses whose testimony was used at discharge proceeding were not made available for cross-examination, as required by Air Force regulations.).

The courts' insistence that Government agents obey the

law has not been confined to overturning agency action. In some instances the more drastic step of overturning a criminal conviction outright has been taken where the conduct exposing the defendant to criminal sanctions was induced by a violation of agency regulations. *See Yellin v. United States, supra,* 374 U.S. 109, 10 L.Ed. 2d 778 (Overturning conviction of contempt of Congress on the ground that refusal to testify was justified by Congressional Committee's failure to adhere to its own regulations on executive sessions.); *United States v. Coleman,* 478 F.2d 1371, 1374 (9th Cir. 1973) (Conviction for refusing induction reversed where Army failed to apply its own standard of fitness for induction.); *United States v. Jones,* 368 F.2d 795 (2d Cir. 1966) (Conviction of narcotics addict for failure to register at border reversed where customs officials failed to observe regulation requiring them to supply registration form.). *See generally, United States v. Smith,* 443 F.2d 1278, 1279-80 (9th Cir. 1971).

The Government's invitation to the Court to narrow the scope of its agents' obligation to obey the published regulations of their agency cannot be taken up without overruling fundamental principles announced by this Court in decisions it has followed for many years.

2. Alternatively the Government argues that, whatever may be the obligations of its agents to observe the requirements of due process by obeying agency regulations in their agency's administrative proceedings, the principle that Government agents must obey such regulations does not apply to the procedural protections at issue here, because they are not trial-type procedures applied in an adjudicative context. G.P. 9, 13. The Government argues that because these procedural regulations apply to the investigative phase of the criminal justice system and could not be relied upon by defendants to their detriment, suppression is

inappropriate. Here, too, the Government is asking the Court to overturn settled principles.

The federal courts have long responded to violations of investigative procedural safeguards by suppressing evidence gathered by means of the offending conduct. *See, e.g., Katz v. United States,* 389 U.S. 347, 19 L.Ed. 2d 576 (1967) (holding that evidence seized during a criminal investigation by means of warrantless, unconstitutional electronic surveillance must be excluded). The Government has cited no authority for the distinction it attempts to make between unconstitutional investigative conduct that denies a citizen's Fourth Amendment rights and unconstitutional conduct that violates the Due Process Clause. *Bridges v. Wixon, supra,* did not involve adjudicative procedures, but rather an agency regulation governing investigative techniques in taking statements from potential witnesses.

Bridges also demonstrates that detrimental reliance by a citizen for whose protection the regulation was promulgated is not the basis of the violation of the Due Process Clause. In that case the petitioner could not have been aware of the unlawful conduct, because it was not even directed at him, but rather at third parties interviewed in connection with the investigation. The Government's attempt to limit the accountability of its agents to situations in which there has been detrimental reliance is especially inappropriate where the unlawful conduct is surreptitious. A citizen can never detrimentally rely upon a procedural safeguard against surreptitious intrusions by agents of the Government, because the very nature of the intrusion is such that he cannot protect against or detect it. His conduct will be the same whether the surreptitious intrusion does or does not occur. Reliance is not the issue. *See generally,* Note, *Violations by Agencies of Their Own Regulations,* 87 Harv. L. Rev. 629, 631-32 (1974). The purpose of such safe-

guards is not to prevent Government agents from tricking the public or inducing detrimental reliance. The purpose is to eliminate the "dirty business" of improper clandestine activity altogether. *See Olmstead v. United States,* 277 U.S. 438, 470, 483-85, 72 L.Ed. 944, 952, 958-59 (1928) (dissenting opinions of Justices Holmes and Brandeis).

3. The Government's second alternative argument is that the obligation of its agents to observe the requirements of due process by obeying agency regulations does not extend to avoiding all infractions, and particularly not to technical violations[4] or transgressions against internal "housekeeping" regulations. Respondent agrees. The lower federal courts have had no difficulty in distinguishing substantial violations from merely technical ones—refusing to permit the former and excusing the latter in a proper case. *Compare United States v. Leahey,* 434 F.2d 7 (1st Cir. 1970); *United States v. Sourapas,* 515 F.2d 295 (9th Cir. 1975); *United States v. Heffner,* 420 F.2d 809 (4th Cir. 1969); *United States v. Wohler,* 382 F. Supp. 229, 233 (D. Utah 1973); *United States v. McDaniels,* 355 F. Supp. 1082, 1085-86 (E.D. La. 1973); *United States v. Maciel,* 351 F. Supp. 817, 819 (D.R.I. 1972); *United States v. Brod,* 324 F.

4. The Government's contention (G.P. 17 n. 15) that the violations here were technical and inadvertent is contradicted by the trial court's finding, which the Ninth Circuit upheld, that the violations here were substantial and unexcused. The Ninth Circuit expressly avoided holding that a mere technical or inadvertent noncompliance would result in suppression. It should also be noted that the Government's presentation of Judge Friendly's view of *Heffner, Leahey,* and *Sourapas* (G.P. 13) is incomplete. In *United States* v. *Leonard,* 524 F.2d 1076, 1089 (2d Cir. 1975) Judge Friendly observed in *dicta* that he was "not at all sure that we would follow the *Heffner-Leahey-Sourapas* doctrine *in the case of an occasional and undeliberate departure* [from agency regulations]." (emphasis added) Notably, no such observations appear in *United States* v. *Gentile,* 525 F.2d 252, 259 (2d Cir. 1975), which, like *Leonard,* held that agency procedures had not been violated and therefore that the suppression issue was not presented.

Supp. 800, 802-03 (S.D. Tex. 1971), *with Johnson v. Chafee,* 469 F.2d 1216, 1218-19 (9th Cir. 1972); *Oshatz v. United States,* 404 F.2d 9, 12 (9th Cir. 1968); *United States v. Morse,* 491 F.2d 149, 156 (1st Cir. 1974); *United States v. Dawson,* 486 F.2d 1326, 1329-30 (5th Cir. 1973); *United States v. Griglio,* 467 F.2d 572, 575-77 (1st Cir. 1972); *United States v. Mathews,* 464 F.2d 1268, 1269-70 (5th Cir. 1972); *United States v. Bembridge,* 458 F.2d 1262, 1264 (1st Cir. 1972); *Ramirez-Rangel v. Butterfield,* 234 F.2d 828, 830 (6th Cir. 1956).[5]

5. The Government also apparently contends (G.P. 15 n. 13) that suppression was inappropriate because the agents' violation of agency procedures was harmless: that the Justice Department's approval of the IRS' eventual application for authorization shows the earlier surreptitious activity would have been authorized as well if an application had been submitted. This conjecture on a factual question is an inappropriate basis on which to seek a writ of certiorari. *See* R. Stern & E. Gressman, *supra,* § 4.14 at 172. Moreover, the strength of the IRS' application for authorization must be evaluated in light of its false declaration that Dr. Caceres, rather than Agent Yee, was the instigator of the meetings in question. *See* D. Exh. P. In light of the ten-month hiatus in the IRS' investigation, the Justice Department might well have concluded that electronic surveillance would not be appropriate in a case where the investigative agent was taking the initiative in setting up the purported bribery rendezvous. Material misstatements in an application for authority to conduct searches and seizures cannot be considered in determining whether there was a sufficient factual basis for the authorization. *See, e.g., United States v. Hunt,* 496 F.2d 888, 894 (5th Cir. 1974); *United States v. Jones,* 475 F.2d 723, 726 (5th Cir. 1973). In any event, an unwarranted intrusion cannot be justified on the basis of the favorable results it yields for the offending investigative agents. *See, e.g., Whitely v. Warden,* 401 U.S. 560, 567 n. 11, 28 L.Ed. 2d 306 (1971); *Bumper v. North Carolina,* 391 U.S. 543, 548 n. 10, 20 L.Ed. 2d 797 (1968).

The Government's contention (G.P. 17 n. 15) that the IRS was not guilty of bad faith is another instance of a factual disagreement with the trial court's findings. The violation of IRS procedures was clear and substantial. At no point has the IRS made any effort to explain the ten-month hiatus in its bribery investigation. The testimony taken by the trial court shows that the agents had no regard for the regulations at all, and conducted their electronic eavesdropping according to the convenience and scheduling desires of the personnel involved. S. Tr. 22.

The courts have also had no difficulty in distinguishing between regulations designed to protect important personal interests, such as privacy, and regulations merely designed to improve an agency's "housekeeping." *Compare United States v. Heffner, supra; United States v. Leahey, supra; United States v. Sourapas, supra; Morton v. Ruiz,* 415 U.S. 199, 235, 39 L.Ed. 2d 270, 294 (1974) (Right to benefits under Indian assistance program.); *Bridges v. Wixon, supra,* 326 U.S. at 152-54, 90 L.Ed. at 2114-15; *United States v. Coleman, supra,* 478 F.2d at 1274 (Right to exemption under draft regulations.), *with Lyman v. United States,* 500 F.2d 1394, 1396 (Temp. Emerg. Ct. App. 1974); *United States v. Bunch,* 399 F. Supp. 1156, 1162 n. 5 (D. Md. 1975); *Teslaar v. Bender,* 365 F. Supp. 1007, 1010 (D. Md. 1973). *See generally, American Farm Lines v. Black Ball Freight,* 379 U.S. 532, 538-39, 25 L.Ed. 2d 547, 553 (1970).

The best illustration of the contrast is provided by a case in which a defendant sought exclusion of statements made to an IRS Revenue Agent at a point in an investigation when, under the agency's regulations, the case should have been referred to a Special Agent in the Intelligence Division. The disputed provision was Section 10.09 of the Internal Revenue Service Audit Technique Handbook, which requires referral of investigations to the Intelligence Division upon discovery of evidence of fraud "to evaluate the criminal potential of the case and decide whether or not a joint investigation should be undertaken." The purpose of the regulation is to ensure expert input on potential criminal cases, rather than to protect individual rights. Therefore, the court refused to suppress the evidence. *United States v. Lockyer,* 448 F.2d 417, 419-22 (10th Cir. 1971); *United States v. Goldstein,* 342 F. Supp. 661, 668 (E.D.N.Y. 1972). *See generally, Rosenberg v. C.I.R.,* 450 F.2d 529, 532-33 (10th Cir. 1971).

Contrary to the Government's contention (G.P. 14) the regulations at issue in this case, like those in *Heffner, Leahey,* and *Sourapas,* are in no sense "internal" and plainly are not mere housekeeping rules designed to improve agency efficiency. They are a formal part of the IRS' operating procedures, published by the IRS and reprinted by commercial services throughout the United States. *See generally, United States v. Heffner, supra,* 420 F.2d at 812, *and cases cited therein.* These procedures plainly were adopted to place limits upon the sweeping powers conferred on Government agents charged with collection of the revenue. They were intended to protect taxpayers, like Dr. Caceres, whom the IRS has under investigation or suspicion.[6] Paragraph 652.1 of the Internal Revenue Manual so provides:

> The highest level of integrity and ethics will be observed in the granting of approval for the use, and the actual use, of any technical investigative equipment. The Service policy to fully respect and observe the Constitutional and other rights of all persons and to prohibit the improper use of surreptitious listening devices will be strictly enforced.[7]

These regulations, which spell out explicit, detailed, mandatory procedures, are easily distinguishable from merely

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6. The Government has tacitly admitted this in arguing (G.P. 19) that the suppression of evidence seized in violation of regulations like those in this case will discourage agencies from adopting procedures to protect important individual interests.

7. *See also* Internal Revenue Manual ¶ 9389.1(5), declaring that electronic eavesdropping "must be sparingly and carefully used" and "is subject to careful regulation in order to avoid any abuse or unwarranted invasion of privacy."; Internal Revenue Manual ¶ 9389.7.

directory declarations of an agency's policies and goals.[8] *Cf. United States v. Walden,* 490 F.2d 372, 376-77 (4th Cir. 1974) (Navy regulation in question merely stated that civilian personnel were to be used "to the maximum extent possible" in preserving law and order—rather than employing Navy personnel); *United States v. Reeb,* 433 F.2d 381, 384 (9th Cir. 1970); *Smith v. United States,* 478 F.2d 398, 400 (5th Cir. 1973); *Rosenberg v. C.I.R., supra,* 450 F.2d at 532-33. Thus on this point, as on the others discussed above, the Ninth Circuit has carefully observed the settled principles and distinctions spelled out in prior law.

4. The Government notes that the federal courts' supervisory power is an alternative basis for the decision below, in addition to the due process principles on which the Ninth Circuit relied. G.P. 10-11. The exclusionary rule has always been applied not only as a constitutional principle but also as an instrument of the "supervisory power over the administration of justice in the federal courts." *Elkins v. United States,* 364 U.S. 206, 216, 4 L.Ed. 2d 1669, 1677 (1960); *see Rea v. United States,* 350 U.S. 214, 217, 100 L.Ed. 233, 236 (1956); *McNabb v. United States,* 318 U.S. 332, 341, 87 L.Ed. 819, 824 (1943). It has consistently been held that the Courts of Appeals have inherent supervisory powers. *See Cupp v. Naughten,* 414 U.S. 141, 146, 38 L.Ed. 2d 368, 372-73 (1973); *La Buy v. Howes Leather Co.,* 352 U.S. 249, 259-60,

8. *United States v. Kline,* 366 F. Supp. 994, 997 (D.D.C. 1973), cited by the Government, dealt with an unpublished Justice Department memorandum on guidelines for electronic eavesdropping, not agency-adopted procedures published in the very manual agents use in conducting investigations. *Sullivan v. United States,* 348 U.S. 170, 99 L.Ed. 210 (1954), also cited by the Government, dealt with a regulation requiring approval from the office of the Attorney General before evidence could be presented to a grand jury by a United States Attorney in a prosecution for violation of internal revenue laws. The purpose of the regulation was to centralize control over such cases in the Justice Department, not to protect important individual interests.

1 L.Ed. 2d 290, 298-99 (1957). The Courts of Appeals have repeatedly exercised these powers in criminal cases. *See Burton v. United States,* 483 F.2d 1182 (9th Cir. 1973) *and cases cited therein.* The federal courts have an "inherent power to refuse to receive material evidence" in a proper case. *Lopez v. United States,* 373 U.S. 427, 440, 10 L.Ed. 2d 462, 471 (1963).

The Government asserts, on the basis of *Lopez,* that an exercise of supervisory powers is inappropriate unless the Government agents engaged in "manifestly improper conduct." The findings of the District Court in this case satisfy that standard. In *Lopez* this Court specified the kind of conduct that would lead to suppression: in addition to unconstitutional conduct, actions "violating some statute *or rule of procedure,*" the Court said, would warrant exclusion of the improperly seized evidence. 373 U.S. at 440 (emphasis added).[9]

5. The Government's petition seeks not only a curtailment of the obligation of its agents to refrain from unlawful conduct in the course of their investigations, but also a

9. The Government's invocation of 18 U.S.C. § 3501 and Rule 402 of the Federal Rules of Evidence apparently is intended to show that the exercise of supervisory power in this case is contrary to the expressed will of Congress. Section 3501, however, confers no special evidentiary dignity upon confessions or other purportedly inculpatory statements. Its purpose is to make voluntariness the test of admissibility of confessions, so as to avoid exclusion of such statements solely on the basis of delay in arraignment. *See United States v. Holbert,* 436 F.2d 1226, 1231-34 (9th Cir. 1970); 1968 U.S. Code Cong. & Ad. News 2112, 2124-2125. Rule 402 merely restates the familiar principle that relevant evidence not otherwise improper is admissible. As the Second Circuit noted in *United States v. Jacobs,* 547 F.2d 772, 777 (2d Cir. 1976), the Government has cited no authority for its extreme interpretation of Rule 402, and specifically no authority for the idea that Congress, in enacting the rule, "was concerning itself with the supervisory powers of the federal courts." The rule in no way affects the inherent supervisory powers of the federal courts.

reconsideration of the deterrence rationale underlying suppression of the fruits of such conduct. The Government argues that the deterrent effect of suppression is not great where the unlawful conduct involves administrative regulations, and that the effect of suppression will be to discourage promulgation of salutary procedural safeguards like those at issue here. G.P. 17-19.

Respondent submits that the deterrent effect of suppression is greatest in the case of administrative regulations. Where an agency has promulgated procedures to be applied in the context of investigative problems peculiar to its own mission, its officials can be expected to know and understand those procedures. In the present case, the regulations are part of a set of procedures that IRS agents deal with regularly and are directed to learn and follow. Internal Revenue Manual ¶ 9381(3)(e), (f).[10] It may well be a fair complaint that agents of the Government cannot effectively be deterred from running afoul of abstruse constitutional requirements difficult for judges themselves to understand. *See, e.g., Spinnelli v. United States,* 393 U.S. 410, 438, 21 L.Ed. 2d 637 (1969). The deterrent effect of suppression may also be questionable when the rule is applied in post-conviction proceedings, *Stone v. Powell,* 96 S. Ct. 3037, 49 L.Ed. 2d 1067 (1976), or to the conduct of persons other than law enforcement officials. *Cf. United States v. Karathanos,* 531 F.2d 26 (2d Cir. 1976). These complaints have no relevance, however, where suppression is ordered on

10. The Government's suggestion (G.P. 18 n. 17) that the IRS' own disciplinary procedures can be relied upon to curb illegal conduct by investigative agents is another assault on settled principles. Even the availability of criminal sanctions does not supplant the need for suppression of unlawfully seized evidence. *Lee v. Florida,* 392 U.S. 378, 386-87, 20 L.Ed. 2d 1166, 1172-73 (1967); *see United States v. Leahey, supra,* 434 F.2d at 10.

the basis of procedures that are clearly spelled out in the very manual the agents are to use as a day-to-day guide in conducting investigations.

It is doubtful that suppression of unlawfully seized evidence will discourage the adoption of procedural safeguards by federal agencies. The warning requirements in *Heffner, Leahey* and *Sourapas* were adopted in 1967. In the eight years since the first of these decisions, those requirements have remained in full force and effect. As the Government points out (G.P. 6 n. 4), the regulations at issue here were drafted to conform to standards circulated by the Justice Department in 1972—three years after *Heffner* and two years after *Leahey.*

Thus, even if the Court were to conclude that the present scope of the exclusionary rule should be narrowed to be more consistent with the underlying deterrence rationale, the present case would be an inappropriate means to do so. Where a deprivation of constitutional rights results from unlawful conduct in violation of an agency regulation, the deterrent effect of the exclusionary rule is at its strongest, not at its weakest.

CONCLUSION

In this case the Ninth Circuit held that when agents of the federal government engage in conduct that denies a citizen due process by substantially violating published procedures of their own agency designed to protect fundamental personal interests of private citizens, evidence seized in the course of the unlawful conduct must be suppressed. This decision is an application of a very broad and fundamental principle in our system of law, and is harmonious with the many decisions of this Court and the lower federal courts invoking the principle in a wide

variety of contexts. That principle is that even the Government's own agents must respect the law—even a law that their agency could amend or repeal if it so desired. The Government has offered no cogent reason why this principle should be disturbed or reconsidered. Therefore the petition for certiorari should be denied.

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Appendix A

Internal Revenue Service Regulations

652.1

Authority

(1) The procedures established concerning the interception, overhearing, transmitting or recording of telephone or non-telephone conversations, with the consent of one or all of the parties, are set forth herein in accordance with IRS policy statement P-9-35; and in accordance with the Department of Justice Guidelines on "Monitoring Private Conversations With the Consent of a Party," dated October 16, 1972.

(2) Approval of requests for permission to use electronic equipment will normally be extended only in cases involving known or suspected violations of those sections in Titles 18 and 26, USC, which come under the jurisdiction of Inspection.

(3) The highest level of integrity and ethics will be observed in the granting of approval for the use, and in actual use, of any technical investigative equipment. The Service policy to fully respect and observe the Constitutional and other rights of all persons and to prohibit the improper use of surreptitious listening devices will be strictly enforced. *Any employee who knowingly violates or in any way knowingly countenances violation of this policy will be subject to disciplinary action and may be removed from the Service.*

(4) Violations of the procedures outlined in this subsection may put Inspection personnel beyond that protection from State sanctions afforded to Federal officials who act within the scope of their employment.

(5) Monitoring of private conversation will be authorized only when, in the considered judgment of the designated official, such action is warranted and necessary to effective law enforcement.

9381 (3) (e), (f)

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(3) *Investigative Techniques*—Familiarity with the following investigative techniques used in Intelligence investigations is important:

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(e) methods of employing mechanical aids, such as cameras, photostating equipment, and authorized recording and listening devices;

(f) methods of conducting searches, seizures, and arrests; . . . .

9389.1

General Instructions

(1) This subsection provides Service policy (P-9-35) and procedural instructions on:

(a) the investigative use of electronic or mechanical monitoring devices with the consent of one or more parties to telephone or non-telephone conversations; and

(b) other prohibited and permissible uses of investigative devices.

(2) Under no circumstances will any investigative device be used illegally.

(3) Electronic or mechanical devices may be used to overhear or record non-telephone conversations with express advance consent of all parties to the conversation. Supervisor approval is not required for such use.

(4) The term "Consensual Monitoring" as used herein, means the investigative interception, overhearing, or recording of a private conversation by the use of mechanical, electronic or other devices, with the consent of at least one, but not all the participants, as contrasted to "Non-Consensual Monitoring," where no participant consents.

(5) The monitoring of conversations with the consent of one of the participants is an effective and reliable investigative technique but must be sparingly and carefully used. The Department of Justice has encouraged its use by criminal investigators where it is both appropriate and necessary to establish a criminal offense. While such monitoring is constitutionally and statutorily permissible, this investigative technique is subject to careful regulation in order to avoid any abuse or any unwarranted invasion of privacy.

9389.7

Adherence to Service Policy

The Service policy to fully respect and observe the constitutional and other rights of all persons and to prohibit the improper use of surreptitious listening devices will be strictly enforced. Any employee who knowingly violates or in any way knowingly countenances violation of this policy will be subject to disciplinary action and may be removed from the Service. Violations of the procedures outlined above may put Service personnel beyond that protection for State sanctions afforded to Federal officials who act within the scope of their employment. In cases where there is any question concerning the legality or prohibition of the use of investigative equipment, the question will be referred through appropriate channels to the Office of the Chief Counsel. Whenever necessary, Chief Counsel will refer the question to the Department of Justice. Their determination will be controlling on Service personnel.